United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-1124

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UNITED STATES OF AMERICA
- APPELLEE

vs.

HOWARD M. BRONSTEIN and
DOUGLAS P. PENNINGTON
- APPELLANTS

NO. 75-1124

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In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 75-1124

APPEAL

from the

UNITED STATES DISTRICT COURT

for the

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,

-APPELLEE,

vs.

HOWARD M. BRONSTEIN and
DOUGLAS P. PENNINGTON,

DEFENDANTS-APPELLANTS

APPELLANTS' BRIEF AND APPENDIX

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C. WAS THE DEFENDANTS' "CONSENT" TO A SEARCH COERCED BY REASON OF THE AGENTS' THREATS OF IMPOSITION OF A HIGH BOND ABSENT THAT "CONSENT"?

D. UNDER THE TOTALITY OF THE CIRCUMSTANCES, WAS THE DEFENDANTS' "CONSENT" COERCED IN THE FACE OF THE REPRESENTATIONS, THREATS AND DENIAL OF COUNSEL BY THE FEDERAL AGENTS?

III. STATEMENT OF THE CASE.

A. HISTORY OF THE DISTRICT COURT PROCEEDINGS.

The Defendants, Howard M. Bronstein and Douglas P. Pennington were indicted on July 19, 1974 and charged with one count of intentional possession with intent to sell a Schedule I controlled substance, to wit, marijuana in violation of 21 U.S.C. 812 and 841 (a) (1) (Appendix page 4). The principle evidence against the Defendants consists of four suitcases, two yellow, one blue and one maroon, each containing the controlled substance marijuana. On September 19, 1974 both Defendants joined in a single Motion to Suppress the suitcases and their contents. (Appendix 5) An evidentiary hearing was held in connection with the Motion on October 21 and 22, 1974. The Motion to Suppress was denied by the District Court, T. Emmet Clarie, C. J., on November 5, 1974 in a two sentence opinion adopting the findings of fact and conclusions of law submitted by the Government. (Appendix page 6 See also App. pages 7 through 24)

On January 9, 1975 both Defendants entered a plea of guilty to the one count indictment reserving that the plea should not affect the right to appeal the adverse finding on the Motion to Suppress. Such plea as entered was accepted. On March 10, 1975 both Defendants were sentenced to two years imprisonment followed by two years special parole period,

execution of prison term suspended after serving four months, where upon Defendants shall be placed on probation for two years.

Notice of Appeal by both Defendants was filed on March 18, 1975.

B. STATEMENT OF THE FACTS.

On July 6, 1974, Special Agent Wayne Drew, of the Hartford office of the Drug Enforcement Administration, (hereinafter DEA) received a telephone call from DEA Agent Edward McCrady of San Diego, California. Drew was informed that two San Diego airline employees who were "more often than not correct" /Transcript of Hearing (Record on Appeal-Supplement) page 45/, had observed some suspicious conduct. The ticket agents observed two individuals who approached the ticket counter separately, and then talked like friends. Because the ticket agents did not understand the reason for this conduct, they concluded it was suspicious. /T. p. 13/. The Defendant Pennington testified he had indeed entered the terminal and approached the ticket counter after Defendant Bronstein. /T. p. 129/. The reason, not understood by the ticket agents, was that Mr. Pennington was checking for his misplaced wallet and fell behind. /T. p. 129/. The Defendants checked their luggage at the ticket counter before proceeding to the boarding area.

A description of the individuals and their luggage was relayed to Agent Drew. The luggage was described as two plaid and two burnt

orange suitcases of approximately the same weight and type. /_T. p. 13_/. Personal descriptions were also relayed. The suspects were said to be boarding "Flight number 10" to Bradley International Airport, Windsor Locks, Connecticut.

Acting on this information, Agent Drew arranged for a search by the State Police and their marijuana sniffing dog "Meisha" at Bradley Airport. /_T. p. 14_/. The State Police reported with "Meisha" to the baggage reception area, which is out of sight of the passengers who await their luggage in the baggage claim area. When the flight arrived, the luggage off the plane was seized by the State and Federal officers and placed in one long row on the floor solely for the purpose of the dog's search. /_T. p. 117, Appendix p. 25_/.

The stage set, "Meisha" was led through the row of luggage and identified one blue and one yellow suitcase./_T. p. 66_/. "Meisha" "identified" the bags by biting into them./_T. p. 67, 97_/. Agent Seymour described this "identification" on one of the bags:

> He continually sniffed and sniffed and poked it with his nose, and it took one large bite out of the corner of the suitcase, and several other little nips on the suitcase.
>
> /_T. p. 67_/

Trooper Foley, the dog's handler, further testified "Meisha" will on numerous occasions claw and scratch at the bag. /_T. p. 105_/.

The identification of the blue and yellow suitcases was relayed

from the baggage reception area to Agent Drew and the State Police officers waiting in the baggage claim area. Upon signal from Trooper Ringklib, the flight number 10 luggage was sent out to the awaiting passengers. As Defendant Pennington claimed his yellow suitcase he was approached by the DEA Agents, asked his name, and placed under arrest. /T. p. 21/. The Defendant Bronstein claimed a blue and maroon suitcase and proceeded to the car rental area, where he was placed under arrest by Agent Drew. /T. p. 155/.

Once both Defendants had been escorted by their arresting officers to the Troop W office, they were informed of their rights. Both the DEA Agents and the Defendants testified, at this juncture, the Defendants expressed a desire to consult with an attorney, not only once, but at least a few times. /T. p. 47/.

Immediately, or very shortly after the Defendants' requests for counsel, the Agents sought an explanation from the Defendants on their use of aliases. /T. p. 72, 24/. The Agents also proceeded to explain federal search warrant and bonding procedures. In the course of this discussion, the Agents requested the Defendants to consent to a search of the suitcases. /T. p. 32/. The Defendants' response to the Agents solicitation of consent, was hesitation. The Agents reaction to this hesitation reveals that prior to the Agents' request for "consent", certain alternatives had been placed before the

Defendants.

Direct Examination of Special Agent Drew:

Q. So you did ask then if they would be willing to open the bags without the warrant?

A. Yes, we did.

Q. What did they say to that?

A. There was some hesitation, at that point, we read over the alternatives that were available to them, and discussed cooperation, extensive cooperation, and went over the magistrate's hearing again, and the non-surety bond issue again.

/ T. p. 32 /

There can be no doubt as to the Agent's meaning in discussing the "alternatives" offered to the Defendants concerning the "non-surety bond issue". At the evidentiary hearing below, the DEA Agents freely admitted the Defendants were offered the following bargain. In return for the Defendants' "consent" to a search, the Agents would tender a recommendation to the magistrate for the Defendants' release on a non-surety bond.

Cross Examination of Agent Drew:

Q. And did you tell them if they opened the suitcases, you would consider that -- or give you the combination to the suitcases, that you would consider that cooperation?

A. Yes, we did.

Q. Did you indicate to them that that cooperation would be very helpful to them in the ultimate disposition of this case?

A. Yes, we did.

Q. Did you indicate to them that cooperation would be helpful to them, in your opinion, in the amount of bond, or whether or not there was a bond set for their appearance in Court?

A. Yes, we did.

Q. Did you tell them if the cooperated, you recommend a non-surety bond, and that you would get them to a magistrate that day?

A. We told them that we would recommend a non-surety bond.

Q. If they cooperated?

A. That is correct.

/T. p. 50, See also Transcript pages 28, 34, 38 and 84/

A most important aspect of this bargain for "consent", was the Agents' representation that their recommendation of a particular bond to the magistrate is followed 95% of the time. /T. p. 58, Appendix pg. 26/. This representation was especially significant as the Agents also told the Defendants they "would not be inclined to recommend a non-surety bond if they (the Defendants) did not wish to cooperate." /T. p. 61/ It was also made clear to the Defendants, that without the Agents' recommendation for a non-surety bond, a high cash surety bond would be required.

Cross Examination of Agent Seymour:

Q. So you did tell them that it was more than likely, without any recommendation from you, that a surety bond would be required?

A. That's correct.

Q. Before they could gain their freedom?

A. That's correct.

/T. p. 86/

The Defendants' situation was thus clear. The magistrate accepted the Agents' bond recommendation 95% of the time. Without the Agents' recommendation, a high, cash surety bond, which the Defendants could not meet, would be required. The Agents' recommendation for a non-surety bond could be obtained only upon the Defendants' consent to a search. Therefore, the only way the Defendants could avoid jail for at least the weekend, was by cooperating with the Agents by consenting to a search.

Another important factor in the Agents' representations concerning consent, was the discussion of probable cause. The Agents freely admitted, they told the Defendants there was in fact sufficient probable cause for the Agents to obtain a search warrant and that refusing to consent to the search, would result only in delay. /T. p. 49/.

In the face of the Agents' representations, the Defendants asked and were granted the opportunity to be alone to discuss the request that

they consent to a search. The request was granted, and Defendants discussed the Agents' proposition for fifteen minutes. [T. p. 157] After asking a few questions Defendants finally "consented" to the suitcase search, some 1 1/2 hours after the arrest.

IV. ARGUMENT: LAW ENFORCEMENT OFFICIALS CONDUCTED A WARRANTLESS SEARCH AND A WARRANTLESS SEIZURE OF DEFENDANTS' LUGGAGE WITHOUT PROBABLE CAUSE IN THE USE OF A TRAINED GERMAN SHEPHERD DOG.

The United States Supreme Court broadly construes the scope of the Fourth Amendment's protection. The Court extends this protection to persons and houses, United States v. Jeffers, 342 U.S. 48 (1951); to automobiles, Preston v. United States, 376 U.S. 364 (1964); to occupied taxi cabs, Terrones v. United States, 364 U.S. 253 (1960); to cardboard cartons, Henry v. United States, 385 U.S. 393 (1966). Suitcases are also clearly included as "effects" in the Fourth Amendment protection of "(t)he right of the people to be secure in their persons, houses and effects." United States v. Sorrano, 482 F.2d 469, 472 (5th Cir. 1973); United States v. Colbert, 454 F.2d 801 (5th Cir. 1971); Hernandez v. United States, 353 F.2d 624 (9th Cir. 1966), cert. den. 384 U.S. 1008.

That the suitcases were in the custody of American Airlines, does not divest them of Constitutional protection under the Fourth Amendment. Ex Parte Jackson 96 U.S. 727 (1877); Santana v. United States, 329 F.2d 854 (1964); Oliver v. United States, 239 F.2d 818 (1957). The Defendants did not abandon their suitcases, they merely surrendered custody to be stored for shipment. The right of privacy is not a right attached to property, it is a personal right which cannot

be legally disregarded without the consent of the possessor of that right. Katz v. United States, 389 U.S. 347 (1967); Corngold v. United States, 367 F.2d 1 (9th Cir. 1966).

It is an elementary principle, that absent consent, the warrantless search is valid only if made upon probable cause. Even in the special circumstances involving an automobile, the police must have probable cause to search. Almeida -- Sanchez v. United States, 413 U.S. 266 (1973). Therefore, if the actions of the officers and their dog at Bradley Airport constitute a search, probable cause was required.

The sole basis for the dog search at Bradley Airport was the "tip" from two San Diego ticket agents. That this "tip" was not probable cause to believe a crime had been committed, is conceded by the Government in its brief. /Appendix page 14/. Even the San Diego DEA Agent McCrady, who relayed the tip, conceded it did not provide probable cause. /T. p. 44/. The concession was made even before the "reliable" informants, whose "intuition" was usually correct, was discovered to have described bags of completely different color than those carried by the Defendants.

Absent probable cause, the search of the Defendants' suitcases upon their arrival at Bradley Airport through the use of the german shepherd dog "Meisha", was illegal. The evidence obtained as the fruit of that illegal search, must be suppressed. Mapp v. Ohio, 367

U.S. 643 (1961); Wong Sun v. United States, 371 U.S. 471 (1963)

A. LAW ENFORCEMENT OFFICIALS PERFORMED A WARRANTLESS SEIZURE OF DEFENDANTS' SUITCASES WITHOUT PROBABLE CAUSE.

Despite the Government's Finding of Facts, the transcript clearly reveals the State Troopers seized the Flight number 10 suitcases and lined them up, solely for the purpose of a search. /T. p. 117, Appendix page 25/. As a result of this seizure, the normal course of transferring luggage from the baggage cart, to the conveyor belt, by airline employees, was disturbed. This seizure transpired without the knowledge, supervision or consent of the owners of the Flight number 10 luggage.

At first blush, this intrusion seems negligable, in light of the distance the luggage was moved and the degree of physical manipulation by the Government officers. However, a seizure of this kind must be judged by different criteria.

The distance an object is moved pursuant to a seizure is less important than the reason it was moved. Would a police officer, legally standing outside the window of an apartment, be justified in slightly raising the window shade so as to view the interior? The number of inches the shade need be moved to effect the purpose, is immaterial. Absent probable cause, where the object of a seizure is a search, the

manipulation, detention and physical grabbing of private property as occurred here, without consent, is an illegal seizure. Such conduct results in the secretive disposession of property, and even though for a short period of time, any such dispossession constitutes a search. United States v. Watson, 398 F.2d 460 (7th Cir. 1968), cert. den. 396 U.S. 1027.

The effect of this type of seizure is to deny the freedom from unreasonable, unauthorized Government intrusion on the right to privacy. Every passenger of Flight number 10 was a unwilling, unknowing participant in a Government investigation. The passengers' luggage was surreptitiously utilized as part of a Governmental lineup. The individuals involved were denied a basic privilege not to donate their property to a Government investigation.

One of the primary reasons for the exclusionary rule, is the Court's desire to disassociate itself from police conduct which infringes on personal privacy. This Court must ask, whether it would condone this same activity if the individuals involved were aware of the Government officials actions. Assume the passengers on Flight number 10 had claimed their luggage and were now awaiting a bus to Hartford. A group of the passengers is conversing, with their luggage standing a few feet away. The Agents arrive, and without comment, proceed to pick up the bags and adjust them in a long line to facilitate the dog's search. Control

over property which the Court would be reluctant to concede to the police in the light of day, should not be conceded or permitted under the cover of secrecy.

B. THE GOVERNMENT PERFORMED A SEARCH AND SEIZURE AND UTILIZING THE GERMAN SHEPHERD DOG, "MEISHA",TO DETERMINE THE CONTENTS OF THE DEFENDANTS' SUITCASES.

"Meisha" was an instrument used by Trooper John Foley to ascertain the contents of the luggage removed from Flight number 10. The dog was an instrumentality, in that it was a device under the direction and control of the police. It was taken to the scene expressly for the purpose of determining the contents of the suitcases. For the reasons discussed below, the use of a trained dog to detect marijuana falls squarely within the Fourth Amendment protection against unreasonable search and seizures.

1. Physical Intrusion is Irrelevent to the Fourth Amendment Definition of a "Search".

A search is the probing or exploration for something that is concealed or hidden from the searcher. United States v. Watson, Supra, ; Hernandez v. United States, 353 F.2d 624 (9th Cir. 1966) The physical breach of a technical property line is immaterial to the question of a Fourth Amendment search. Any discussion of the relevance of a physical intrusion for Fourth Amendment purposes, was clearly settled in United

States v. Katz, 389 U.S. 347 (1967).

> "Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people--not simply "areas" against unreasonable searchs and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." Id at 353.

The fact the electronic listening device employed to overhear the appellant's conversation was outside the telephone booth, was held by Katz, to be of absolutely no constitutional significance. The Court specifically rejected the Goldman v. United States, 316 U.S. 129 (1942) requirement of tangible physical intrusion into a constitutionally protected area. Katz is unquestionably the last, and now firmly established, word on this issue. see United States v. United States District Court, 407 U.S. 297, 313 (1971).

Indeed, in this day of national concern over Government surveillance and intrusion in private lives, any other definition of our Fourth Amendment protection renders it useless. The Supreme Court in Katz, recognized that the most insidious of searchs are those covert techniques employed by Government agencies to secretly acquire information without our knowledge.

Despite the clarity of this unchallenged reading of the Fourth Amendment, the Government chooses to distinguish a marijuana dog search from a magnetometer search, on the basis of physical intrusion.

> It is not necessary for 'Meisha' to enter, or in any way penetrate, the Defendants' bags, in order to detect the presence of marijuana. To the contrary, the pungent odor of that substance filtered out from two of the Defendants' four bags. Government's Finding of Facts, Appendix page 16.

This attempt to distinguish between a magnetometer and a dog search, on the basis of trespass, illustrates the absurdity of the "physical intrusion" doctrine.

The magnetometer is a device used at airline boarding areas to search passengers for any metal carried on their person. The use of the magnetometer has unequivocally and repeatedly been held to constitute a "search" under the Fourth Amendment. United States v. Edwards, 498 F. 2d 496 (2nd Cir. 1974); United States v. Albarado, 495 F. 2d 799 (2nd Cir. 1974); United States v. Doran, 482 F.2d 929, (9th Cir. 1973); United States v. Croul, 481 F. 2d 854 (8th Cir. 1973); United States v. Ruiz-Estrella, 481 F. 2d 723 (2nd Cir. 1973); United States v. Moreno, 475 F.2d 44 (5th Cir 1973); United States v. Slocum, 464 F. 2d 1180 (3rd Cir. 1971); United States v. Bell, 464 F. 2d 667 (2nd Cir. cert. denied 409 U.S. 991, 1972); United States v. Epperson, 454 F. 2d 769 (4th Cir. 1972).

The Government properly characterized the magnetometer as a device used for the purpose of detecting metal concealed on a person. /Appendix, page 16/ To then shift position, however, and state that

"Meisha" is not a device used to detect marijuana within a suitcase, is simply absurd. The Government states that the dog is simply innocently sniffing the air around the suitcase. But "sniffing the air" is not the purpose for which the dog was employed. If sniffing the air were the limit of the search, it would be meaningful only to arrest and seize the air. Obviously, in reality, both devices are used to ascertain the presence of a particular object within a protected area.

Even assuming, arguendo, physical intrusion is a relevant inquiry in the determination of this issue, there is no factual distinction between a dog and a magnetometer search. Just as the dog gleaned its information from the air around the suitcase, the magnetometer identifys the metal contained on a person from the magnetic field which surrounds him. Upon rational analysis of the Government's position, it becomes obvious the Government is attempting to draw distinctions without a difference.

Although magnetometers have been consistently held to constitute a search, the same Courts have deemed them permissible. The cases condone the magnetometer search of boarding airline passengers for two reasons, neither of which apply to the instant case.

First, the cases discussing magnetometers repeatedly cite the passengers' consent to the search. At all airplane boarding areas, large signs warn of the impending search required prior to admission

on the flight. Forwarned, the passengers then have the option to withdraw or pursue their intention to board the plane.

On the facts before the Court, the Defendants did not attempt to board the plane with their luggage. The luggage was checked at a ticket counter prior to approaching the boarding area. There is no evidence, as there could not be, of any sign at the ticket counter warning of a possible search. In fact, a reasonable airline passenger would draw the logical conclusion,since he is warned of a search in the boarding area, that he would have been warned of a search at the ticket counter, were there an intention to search his luggage. In short, there was no consent.

An even more important factor to the Courts who ultimately permitted the magnetometer search, was the clear and present danger to great numbers of human lives presented by this decades public enemy #1, the hijacker. Only because of the astounding threat to human life posed by the hijacker, were the Courts willing to waive the warrant requirement of the Fourth Amendment.

These Defendants obviously, did not present a clear and present danger to anybody. To the contrary, the very question of marijuana's illegality is in serious dispute. The Defendants' crime was malum prohibitum, not malum in se. Nor could the Defendants have threatened the flight, no matter what was contained in their suitcases. It is not a

part of the airport's screening process to search luggage checked before boarding the plane. Such luggage is placed in the baggage area, beyond the passengers' control. Any search conducted of this luggage is unrelated to the airport's screeing program, which is designed solely to catch potential hi[illegible]ers. The United States v. Rothman, 492 F.2d 1260, 1266(9th Cir. 1973); United States v. Plazzo, 488 F.2d 942 (5th Cir. 1974); United States v. Ogden, 485 F. 2d 536, 538 (9th Cir. 1973).

Magnetometers and dogs are both devices implemented by the police to seek out the contents of a constitutionally protected area. Whether either device crosses or touchs a technical property line, is irrelevant. See also United States v. Kenaan, 496 F.2d 181 (1st Cir. 1974).

2. Regardless of the Katz Doctrine, There was, in Fact, a Physical Invasion of the Defendants' Property Pursuant to the Search.

Ignoring for the moment the Katz Decision, a search was conducted even under the old Goldman v. United States, Supra, doctrine. That is, there was a physical trespass and intrusion of the Defendants' property pursuant to this search. By the officers and Agents own testimony, "Meisha" bit into the Defendants' luggage several times. This was not an unusual occurrence. By nature of the method used, the existence of marijuana is relayed to the handler, by the dog's biting,

and often scratching the subject suitcase. /T. p. 105/.

If an attempt to seek out the contents of personal belongings is not a search, certainly attacking those belongings with a dog must be. Taking a good, healthy bite out of a suitcase is not an intrusion lightly to be dismissed. Property damage seems the likely result of such conduct by a german shepherd dog.

If standing alone, the biting and scratching of a suitcase is not an intrusion under the Fourth Amendment, then certainly the combination of all the factors surrounding this search and seizure does constitute a search. In addition to the biting dog, is the seizure and lineup by the Government officials and their surreptitious attempt to determine the contents of an enclosed area.

3. The Plain View Exception to the Fourth Amendment Warrant Requirement is Inapplicable on the Facts of This Case.

Under the plain view doctrine, what a man does not intend to conceal from his neighbors, he cannot claim to have concealed from the police under his Fourth Amendment protections. Contrary to the Government's intimation, this doctrine does not apply to the facts before the Court, by reason of the following important elements that make up this exception to the warrant requirement.

First, the object seized must be in the plain view of the investigating officer.

> It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view, are subject to seizure and may be introduced in evidence.
>
> Harris v. United States, 390 U.S. 234, 236 (1967) (Emphasis Added)

The record is devoid of any indication whatsoever that the officers in this case could, or did themselves smell the marijuana. Therefore, there was no "plain smell" of the marijuana. An ultra-sensitive instrument was used to detect the marijuana, rather than a resort to the officers own sense of smell.

Secondly, the suitcases were not even in the "plain view" of the dog. To facilitate the search, the bags were placed on the floor to provide the dog with access. Plain view does not apply where officers set there own stage for that view. Again, take the example of an officer pulling up a window shade to provide himself with a "plain view" to the interior.

Most importantly, the fundamental reason for the creation of the plain view doctrine, does not apply under these circumstances. Law enforcement officers are permitted to search under "plain view" because of the Defendant's lack of an actual, subjective expectation of privacy.

> What a person knowingly exposes to the public, even in his own home or office, is not subject of the Fourth Amendment protection. See Lewis v. United States,

385 U.S. 206, 210, 87 S.Ct. 424, 17 L. Ed. 2nd 312; United States v. Lee, 274 U.S. 559, 563, 47 S.Ct. 476, 71 L. Ed. 1202; but what he seeks to keep as private, even in an area accessible to the public, may be constitutionally protected. See Rios v. United States, 364 U.S. 253, 80 S. Ct. 1431, L.Ed. 2nd 1688; Ex Parte Jackson 96 U.S. 727, 733, 24 L. Ed. 877; Pizzola v. Watkins, 442 F.2d 284 (5th Cir. 1971); Barrios v. Louisiana Construction Material Company, 465 F.2d 1157 (8th Cir. 1971).

Certainly, these Defendants had every intention and expectation that the contents of their suitcases would remain private. In exercising and protecting their Constitutional right to privacy, the Defendants cannot be said to have, in effect, abandoned them to the plain view doctrine.

A synonym to the plain view doctrine is the "open field doctrine". The phrase used to define this exception, is revealing. Absent on the facts before the Court, is the boundless exposure to an "open field" from which this doctrine obtains its name. Instead, the investigating officers were faced with the very real obstacle presented by the walls of the enclosed suitcase. A protected, enclosed area, intentionally sheltered from all the world, cannot be said to have been left "open" to anyone.

4. Summary of Dog Search Argument.

Dog searchs can prove a valuable, legal tool to law enforcement officers when used at a national border, or in conjunction with probable cause and exigent circumstances. Absent one of these

established exceptions, however, the search must be conducted only pursuant to a valid search warrant. Where, as here, the search is conducted in the full discretion of law enforcement officials, it is a tool subject to unlimited abuse. There would be nothing to prevent a dog and his handler from standing on a busy street corner, attempting to identify those passersby who have, or who had, marijuana on their possession. On the basis of a resulting identification, the individual could then be placed under arrest.

In determining and creating the reliability of this search device, complete discretion must again be placed with the police, rather than an impartial magistrate. The police decide the method of training the dog, and when that training has been complete.

The record clearly indicates that "Meisha" missed two of the four suitcases containing marijuana. It is difficult to justify an intrusion on personal rights where there is, at best, only a 50% chance the dog will even detect marijuana where it exists. From the testimony of Trooper Foley, there is no way of determining whether accuracy of the dog is better than 50%. Judging from the results of this case, quite a number of people must suffer the intrusion to provide this poor a detection device an opportunity to search. One can only speculate that an experienced marijuana courier (and the method of operation used by these Defendants certainly indicates their lack of experience) would be

able to escape detection from this dog altogether.

In support of its position, the Government offers one federal case. Not discussed, and seemingly not even raised in United States v. Fulero, 498 F.2d 748 (4th Cir. 1974), however, were the numerous United States Supreme Court and Court of Appeals Decisions and principles cited herein, clearly supporting only the opposite conclusion. The Defendants submit, the better reasoned decision of United States v. Solis, 43 U.S.L.W. 2425 (U.S.D.C. CCalif. 3/27/75) more fully considers the issue before the Court.

Realizing that "physical intrusion" has been rejected since Katz v. United States, Supra, the Court in Solis found the Government's attempt to ascertain the contents of Defendant's trailer by use of trained dogs constituted a search "per se".

> The Court believes that Solis had such an expectation of privacy. His trailer was completely enclosed--its interior was not exposed to public view.... thus, by employing the olfactory senses of two trained dogs, Government agents gained information substantially equivalent to what they would have acquired had they actually opened the doors and examined the trailer's concealed interior. Under these facts, the Court finds that Solis did have a reasonable and justifiable expectation that the interior of his completely enclosed trailer was a private place protected from a search without a warrant issued upon probable cause, and that the use of these dogs contravened this expectation and indeed this private area. Id at 2425 (Emphasis Added)

The use of dogs by Government agents to probe and extract information from an enclosed private area, is a search under the Fourth

Amendment. Evidence obtained as the fruit of this warrantless search, conducted without probable cause, must be suppressed. Wong Sun v. United States, Supra.

V. ARGUMENT: THE DEFENDANTS DID NOT VOLUNTARILY CONSENT TO THE SEARCH OF THEIR SUITCASES.

The facts of this case raise very serious questions about the manner in which the two Federal Agents involved, as general practice, procure consents to search from in-custody Defendants.

The testimony of the Agents themselves reveals clear cut disregard for the Defendants' repeated requests for counsel. The Agents used a threat of high bond, and high bond recommendations as devices to obtain the Defendants' cooperation and waiver of Constitutional rights. The Agents' testimony, which is in accord with the testimony of the Defendants, is not disputed by the Government.

The testimony of the Defendants as to other material facts, which is disputed by the Government, further discloses the Agents employed the threat of delay in presentment to a magistrate and punitive pre-arraignment incarceration over a weekend, as a way to obtain the Defendants' consent to a search.

In the proceedings below, the Government acknowledged the disregard of the Defendants' requests for counsel and the Agents use of bond as a tactic to secure a waiver of Constitutional rights. The Government argued however, the Defendants were responsible for such occurrences because they initiated the conversation with the Agents. Not only is this argument factually incorrect, but at best,

it misconstrues the fundamental nature of the Fifth and Eighth Amendment rights involved, and at worst, it insensitively affirms the Agents callous treatment of those rights.

The undisputed facts of this case establish that subsequent to their arrest at the airport, the Defendants were escorted to a state police office at the terminal, were advised of their rights, and explicitly requested the assistance of counsel. It is also undisputed that this request was repeated more than once. /_T. p. 47 (Testimony of Agent Drew); T. p. 132 (Testimony of Defendant Pennington)_/

Despite the requests for counsel, the Agents proceeded to question the Defendants as to their identities and the reason for their use of aliases. While the Government contended below that the Defendants initiated this interrogation, the testimony of the Agents clearly establishs to the contrary.

Agent Seymour testified on direct examination that the Agents sought information as to the Defendants' identification immediately after the Defendants had been advised of their rights. (and thus, after their request for counsel);

> Q /_By Mr. Smith_/: Do you recall either of these Defendants making a request to consult with an attorney?
>
> A /_By Ageny Seymour_/: They said that they would not make -- they didn't want to make any statements to us at first, without talking to their lawyer.

Q: How long was it after they had been brought into the room that they said this?

A: Well, after we advised them of their rights, we asked them for identification. We asked them why the disparity in the names that they used, which didn't agree with their identification.

/_Transcript page 72_/

Agent Drew similarly testified that the Agents inquired as to the Defendants' identification and correct names. /_T. p. 24_/ It is undisputed that in the course of the discussion between the Agents and the Defendants that ensued, subsequent to the request for counsel, the Defendants were asked to cooperate with the Agents and were told that the Agents would recommend a non-surety bond if the Defendants would allow the suitcases to be opened. The Agents further told the Defendants, and so admitted at the hearing, that they would not recommend a non-surety bond absent the Defendants' cooperation and that the magistrate accepted the Agents' recommendations as to bond 95% of the time. The Agents testified they also told the Defendants that they (the Agents) had probable cause to obtain a warrant and that the only consequence of the Defendants' refusal to consent to the suitcase search, would be delay.

In the face of the Agents' representations, the Defendants hesitated, requested and were granted the opportunity to speak together

alone, and then, 1 1/2 hours after their arrest, finally "consented" to the search of the suitcases.

The Defendants contend that such "consent" was involuntary and invalid because,one, the consent was solicitated and obtained after the Defendants had requested the assistance of counsel but before the opportunity to obtain counsel had been provided; two, the consent was obtained through the coercion of a high bond; and three, under the totality of the circumstances, consent cannot be deemed voluntary.

A. THE AGENTS' CONTINUED INTERROGATION AND SOLICITATIONS AFTER THE DEFENDANTS' REQUEST FOR COUNSEL, INVALIDATES THE CONSENT TO SEARCH.

It is, after Miranda v. Arizona, 384 U.S. 436 (1966), well established that the Agents could not continue questioning the Defendants after the Defendants requested the assistance of counsel and stated they did not wish to make any statements in the absence of such counsel.

As the Supreme Court ruled in Miranda:

> 'Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease...If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time the individual must have an opportunity to confer with the attorney and have him present during any subsequent questioning.' Miranda v. Arizona, 384, U.S. at 474; See also 384 U.S. at 445.

With respect to the holding in Miranda, the Fifth Circuit Court of Appeals has observed, "the language of the Supreme Court in Miranda could hardly have been more uncompromising." United State vs. Blair, 470 F.2d 331, 338 (5th Cir. 1972).

Miranda is clearly applicable to the Defendants custodial detention at the airport police office.. United States v. Ruis--Estrella, 481 F.2d 723, 728 (2d Cir. 1973).

The Miranda prohibition on further questioning encompasses the attempts of law enforcement officials to secure subsequent waivers of Fourth, as well as Fifth Amendment rights, before requested counsel has been provided. United States v. Fisher, 329 F. Supp. 630 (D Minn. 1971); United States v. Pelensky, 300 F. Supp. 976 (D Vt. 1969) As the Fisher Court noted:

> "The very purpose of the Miranda warnings are to permit a Defendant to refuse further interrogation and to enable him to obtain legal advice as to his rights. The interrogating officers, in any case, when a Defendant so expresses himself and lodges such a request, should not continue interrogation nor seek further to procure consentual admissions from him, whether in the form of confessions, consent to search, waiver of privilege, or otherwise."
>
> United States v. Fisher, 329 F. Supp. at 634.

The Government seeks to avoid the dictates of Miranda by proferring the familiar argument that after the request of counsel, the

Defendants initiated the discussion with the Agents that led to consent. The Government's argument misconstrues the facts and the applicable law.

As discussed above, after the requests for counsel, the Agents questioned the Defendants about their identities and their use of aliases. This questioning was clearly designed to provide inculpatory information. No attempt was made to secure counsel or allow the Defendants an opportunity to contact counsel. There was no recognition whatsoever of the Defendants' requests. Significantly, during the subsequent conversation, the Defendants repeated their requests for counsel, always to no avail.

Despite the above, the Government argued the Defendants initiated all conversation in order to determine arraignment procedure. Assuming arguendo this contention is valid, the Defendants still at no time retreated from their earlier decision to make no statements in the absence of counsel. Rather, the Defendants repeated their requests for counsel, negating any proper conclusion that their formal requests had been waived. Furthermore, there is no evidence (and indeed it would strain credibility to believe) that the discussion of cooperation in bond originated with the Defendants. Agent Drew testified that he could not recall who

first brought up the matter of bond:

> Q /_By Mr. Smith_/: Okay. Who first brought up the subject of bond, you or they?
>
> A I really couldn't say. It was the type of thing that comes up in the course of your explaining to them the procedure. They may have asked more questions about bonds, once the subject had been broached -- I don't know.
>
> /_Transcript page 28, emphasis added_/

The Defendant Pennington had no difficulty remembering,

and his testimony reflects well the likely tactic of the Agents:

> Q /_By Mr. Slitt_/: Now, how many times would you say you requested, that you made the request that you wanted to see or speak with an attorney?
>
> A Three or four times -- quite adamantly.
>
> Q Whether these Agents or any of these police officers replied to that request in any way?
>
> A They didn't reply to it.
>
> Q What did they say to you when they made that request? What did they talk about?
>
> A Cooperation.
>
> Q They talked about cooperation?
>
> A Yes, sir.
>
> Q And did you assume -- did you make an assumption with regard to the request for an attorney, when they talked about cooperation?
>
> ...

Q Did you then make an assumption regarding your continued insistence upon an attorney, as to whether that would be cooperative or not cooperative?

A Well, I assumed by then that they just didn't want to hear me talking about asking for an attorney; that to them that was non-cooperation.

/ Transcript pages 140 through 142 /

The Defendants were denied their right to effective assistance of counsel. If the Defendants' testimony is believed, it is clear that the Agents deliberately disregarded the repreated requests for counsel in their effort to secure cooperation. If only the Agents' testimony is believed, it is still clear that questioning was initiated after the request for counsel. That questioning included requests for information concerning aliases, for "consent" to a search and an outline of the Agents' interpretation of the bail process. All in the face of repeated requests for counsel. Thus, factually, there is no basis for concluding the Defendants withdrew their requests for counsel and chose to speak with the Agents.

Even assuming, arguendo, the validity of the Government's factual position, as a matter of law, there was no voluntary waiver of rights by the Defendants. This is not a case of spontaneous admission or unsolicited confession from a willing Defendant. Rather, the Agents' testimony discloses a period of continued solicitation and importunings, marked by hesitancy on the part of the Defendants, and

finally submission to the Agents' request. The law is firm that "(o)nce the privilege has been asserted, ...an investigator must not be permitted to seek its retraction, total or otherwise." United States v. Crisp, 435 F.2d 354, 357 (7th Cir. 1970). Accord: United States v. Clark, 499 F.2d 802, (4th Cir. 1974). At the very least, the Defendants should have been offered an opportunity to obtain a lawyer. Clark, Supra, at 807.

The difference between the instant case and United States v. Scheiblauer, 472 F.2d 297, 301 (9th Cir. 1973), relied on by the Government below, is apparent. In Scheiblauer, the Defendants requested counsel, but then spontaneously volunteered statements of guilt and opened his bag without request from the law enforcement officials. Here, the Defendants consented to the suitcase search only after repeated requests for counsel had been voiced.

The Agents' failure to honor the Defendants' requests for counsel, clearly invalidates any consent to search the suitcases the Defendants may have given during the interrogation subsequent to that request.

B. THE DEFENDANTS' CONSENT TO SEARCH THE SUITCASES WAS COERCED BY THE AGENTS' THREATS OF HIGH BOND ABSENT CONSENT, AND THUS THE CONSENT WAS INVOLUNTARY AND INVALID.

While, as a general rule, the voluntaryness of a consent is

judged by the totality of the circumstances under which it is given, Schneckloth v. Bustamonte, 412 U.S. 218 (1973); United States v. Faruollo, 506 F. 2d 490 (2d Cir. 1974); in the instant case there is such clear cut evidence of coercion, that as a matter of law, the consents must be deemed involuntary.

At the hearing, the Agents testified the Defendants consented to the search only on the condition or promise that the Agents would recommend a non-surety bond.

Agent Drew specifically testified that the condition attached to the consents was just such a recommendation to the magistrate:

> The Court: Were there any conditions attached to it /the consents/?
>
> The Witness: We told them that we would recommend a non-surety bond if they consented to the opening of the suitcases. Other than that, there were no promises. /T. p. 59/

Agent Drew further testified that he told the Defendants the Agents "would not be inclined to recommend a non-surety bond if they /the Defendants/ didn't wish to cooperate /T. p. 61/. Cooperation had been defined as consenting to a search of the suitcases.

Agent Drew also testified he told the Defendants that the magistrate accepts the Agents' recommendations "approximately 95% of the time". /T. p. 58/ Agent Seymour testified similarly, as did the Defendants.

It was clearly impermissible for the Defendants Constitutional right to a reasonable bail under the Eighth Amendment, to be conditioned on waiver by the Defendants of their Fourth Amendment privilege against a warrantless search. Noto v. United States, 76 S.Ct. 255 (1959). It is absolutely fundamental that the exercise of a Constitutional right not be conditioned on the waiver of another Constitutional right.

In Noto v. United States, Supra, Justice Harlan confronted a situation analagous to the instant case. A bond was set especially high because the Defendant had refused to waive his Fifth Amendment privilege against self-incrimination. Justice Harlan, after conferring with the other Justices, reduced the bond, holding that the bail could not be conditioned on waiver of Fifth Amendment rights. Justice Harlan's opinion adopted the reasoning of Judge Clark's dissent in this Court below. As Judge Clark wrote:

> "While /a Defendant/ may be allowed to form the benefit of the Fifth Amendment privilege against self-incrimination, yet all force of that great privilege is disintegrated by his facing confinement for resort to it."
>
> Noto vs. United States, 226 F. 2d 953, 955 (2nd Cir. 1955) (Clark, J., dissenting)

The Noto holding is equally applicable to forfeiture of the Fourth Amendment privilege under a threat of high bond.

As the Defendants were informed the Agents' bond recommendation depended on cooperation and, especially significant, that the

magistrate would follow the Agents' recommendations 95% of the time, the waiver of Fourth Amendment rights was improperly coerced and invalid.

Law enforcement officials cannot be permitted to utilize the bonding process as a tool to extract Constitutional rights. Not only does this practice destroy any presumption of an "impartial magistrate," it forces a Defendant to suffer an unconstitutional and lengthy pre-trial incarceration as the price for exercise of a Constitutional right.

Nor is there "consent" if the Agents were misleading the Defendants as to the 95% control they exercised over the magistrate. Were the Agents misleading the Defendants, the situation would be analogous to that in the Bumper v. North Carolina, 391 U.S. 543 (1968) where the officers lied about their ability to procure a search warrant.

Consequently, regardless of whether the facts support the Agents' representations, the Defendants were coerced into releasing their "consent" to the search.

C. UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE DEFENDANTS CONSENTS MUST BE HELD INVOLUNTARY.

Even assuming the individual issues raised above do not separately constitute coercion, the totality of the circumstances certainly reveal an involuntary consent to search the suitcases was extracted

from the Defendants.

The Defendants were arrested and then detained in a small police office. Their repeated requests for counsel were disregarded, and they were confronted with continued importunings for consent to search. They were told that probable cause to search the suitcases did, in fact, exist and that the only result of requiring a warrant would be delay. (The delay, of course, might result in incarceration over the weekend.) See United States v. Faruollo, 506 F. 2d 499, 497-8 (2d Cir. 1974) (Newman, J., concurring) as to the significance of such statements. The Defendants were also told the only way they would receive a non-surety bond and avoid spending at least the weekend in jail, was to consent to a search.

The Defendants have no prior criminal record or legal background. They are unsophisticated in the legal questions surrounding bail and search warrants. This made them prime targets for the "advice" of the DEA Agents. With no family ties in this state and only a $120.00 between them, they were justifiably concerned about the talk of a $25,000.00 cash bond. /T. p. 162/ To these Defendants, the threat of jail was not a threat easily dismissed from mind.

The Government clearly has not sustained its "heavy burden", Schneckloth, Supra, with these respect to these consents This is not a case of a Defendant immediately acquiescing to a law enforcement

officer's request for cooperation. Only after repeated requests, met by hesitation and uncertainty, did these Defendants finally consent to a search. Without the assistance of counsel, the Defendants will was ultimately overborn and the Agents disposed of the case after their own fashion.

VI. CONCLUSION.

The Defendants, for the reasons submitted, respectfully urge that the ruling appealed from below be set aside.

THE APPELLANTS,

BY Aaron P. Slitt
Aaron P. Slitt, Esquire
242 Trumbull Street
Hartford, Connecticut 06103
Their Attorney

BY Stephen McEleney
Stephen McEleney
242 Trumbull Street
Hartford, Connecticut 06103
Their Attorney

CERTIFICATE OF SERVICE

A copy of the foregoing has been hand delivered to the office of Thomas P. Smith, Esquire, Assistant United States Attorney, 450 Main Street, Hartford, Connecticut, this 27th day of May, 1975.

Stephen McEleney

Stephen McEleney, Esquire

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 75-1124

APPEAL

from the

UNITED STATES DISTRICT COURT

for the

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,

-APPELLEE,

vs.

HOWARD M. BRONSTEIN, and
DOUGLAS P. PENNINGTON,

DEFENDANTS-APPELLANTS

DEFENDANTS-APPELLANTS' APPENDIX

Submitted by:

Aaron P. Slitt, Esq.
Stephen McEleney, Esq.
242 Trumbull Street
Hartford, Conn. 06103

Attorneys for Defendants-Appellants

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LIST OF EXHIBITS

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CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

T. EMMET CLARIE

D. C. Form No. 100 Rev.

H74/118.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	*For U.S.:*
vs.	Harold J. Pickerstein, US Atty.
HOWARD M. BRONSTEIN	Thomas P. Smith Asst US Atty.
and	450 Main St., Hartford, Conn.
DOUGLAS P. PENNINGTON	
	For Defendant:
Both Defts.-Stephen McElenny	D.-Pennington & H. Bronstein - Aaron P. Slitt
242 Trumbull St.,	& D. Pennington 242 Trumbull St.
Hartford, Conn.	Hartford, Conn.
	D./Pennington-/Hubert/J./Santos/
	/51/Russ/Street/
	/Hartford,/Conn./06106/
	//Phone:/249-6548/

STATISTICAL RECORD	COSTS			DATE 1975	NAME OR RECEIPT NO.	REC.	DISB.
				3/17	A.P.Slitt,Esq. (Appeals)	$ 10 00	
J.S. 2 mailed	Clerk			3/31	Deposit C.L.100869		10 00
J.S. 3 mailed	Marshal						
Violation U. S. Code	Docket fee						
Title 21							
Sec. 812 and 841(a)(1)							

DATE 1974	PROCEEDINGS
7/19	The Grand Jury at Hartford returned a True Bill of Indictment charging violation of 21 USC 812 and 841(a)(1) in one count - knowingly and intentionally possess with intent to distribute a Shedule I controlled substance, to wit, marihuana. Summons to issue.(Clarie,J.) m-7/22/74
7/22	Summons issued for Sept. 9th in duplicate for each defendant and with certified copy of the indictment handed US Marshal for service.
8/2	Marshal's executed return, filed. (Summons, ea. deft.)
9/9	PLEA of not guilty on one count indictment entered by both defendants. Defendant's Attorney has two weeks to file motions. Govt. to answer in one week. No bond necessary.(Clarie,J.)m-9/10/74
9/18	Appearance of Hubert J. Santos, Esq., to represent Deft. Pennington entered and filed.
9/19	Motion To Suppress and Motion To Dismiss, filed.
9/26	Notice to the Court of Possible Impropriety In The Appearance of Hubert J. Santos as Counsel In United States v. Bronstein and Pennington, Criminal No. H-74-118, filed.

CONTINUED

DATE 1974	PROCEEDINGS
9/9	Court Reporter's Sound Recording of Proceedings held on September 9, 1974, filed in Hartford. (Sperber, R.)
10/10	Appearance of Aaron P. Slitt entered and filed to represent both defendants.
10/15	Motion To Suppress over to 10/21/74 at 2:00p.m.
10/21	Motion To Withdraw, filed by Atty. Santos re Deft. Pennington.
10/23	Court Reporter's Notes of Proceedings held on September 9, 1974, filed in Hartford. (Sperber, R.)
10/21	Hearing on Defendants' Motion to Suppress - Notice to Court of Possible Impropriety in Appearance of H. Santos as Counsel for Pennington - Atty. Santos states he wishes to withdraw as Atty. of Douglas Pennington - Motion Granted - Govt. Witness, sworn and testified - Atty. Slitt requests that witnesses be sequestered - Motion Granted. Case continued to no date certain. (Clarie,J.)m-10/22/74
10/22	Continued Suppression Hearing -Witness previously sworn, recalled and testified - Govt. exhibits 1 thru 4 marked for identification- 5 Govt. witnesses, sworn and testified - Deft. Bronstein, sworn and testified - Brief with Proposed Finding of Fact and Conclusion of Law to be filed simultaneously by Friday at 10:00 a.m.(Clarie,J.)m-10/23/74
10/22	Appearance of Stephen McEleney entered and filed to represent the defendants.
10/30	Memorandum of Law, filed by the Defendants.
11/1	Government's Memorandum in Opposition To Defendants' Motion To Suppress, filed.
11/5	Endorsement entered on Motion to Suppress: "After having reviewed the factual record and the applicable law, the Court denies the defendants' motion to suppress the 240 pounds of seized marihuana. The Court adopts the Government's proposed findings of fact and conclusions of law as submitted. So ordered." T.Emmet Clarie,USDJ, 11/5/74. m-11/7/74. Copies mailed to counsel of record.
11/15	Court Reporter's Notes of Proceedings held on Oct. 21 and 22, 1974, filed in Hartford. (Sperber, R.)
11/19	Over to Dec. 9th for Plea.(Clarie,J.)m-11/20/74
12/9	Waiver of Jury Trial signed by all parties and approved by Court. Both defendants agree to same counsel. (Clarie,J.)m-12/10/74
12/18	Motion For Discovery and Inspection, filed.
12/18	Government's Response to Defendants" Motion For Discovery and Inspection, filed.
12/24	Endorsement entered and filed on Defendants Motion For Discovery and Inspection, "Dec. 23rd, 1974 Motion for discovery and inspection is granted; compliance within ten (10) days.(Clarie,J.)m-12/27/74 Copies sent to Attys. Smith and Slitt.
1975 1/2	Endorsement entered on Government's Response to Defendants' Motion for Discovery and Inspection: "1/2/75- The government's motion for scientific analysis is granted; so ordered. T. Emmet Clarie, USDJ". m-1/3/75. Copies mailed to counsel of record.
1/7	To go forward on Friday, Jan. 10.(Clarie,J.)
1/9	CHANGE OF PLEA of guilty entered by both defendants to one count indictment, with reservation that this plea shall not affect their right to appeal adverse ruling on Suppression Hearing - Continued for pre-sentence report.(Clarie,J.)

CONTINUED ON PAGE 2

DATE 1975	PROCEEDINGS
3/10	DISPOSITION:(Deft. Bronstein)- 2 yrs. imprisonment followed by 2 yrs. special parole period pursuant to 21 USC 841, execution of term of imprisonment suspended after serving four months whereupon the defendant shall be placed on probation for a period of two years. Bond on appeal set at $5,000.00 with personal surety.(Clarie,J.)
"	DISPOSITION:(Deft. Pennington) - 2 years imprisonment followed by 2 yrs. special parole period pursuant to 21 USC 841, execution of term of imprisonment suspended after serving four months whereupon the defendant shall be placed on probation for a period of two years. Bond on appeal set at $5,000.00 with personal surety.(Clarie,J.)
"	Personal Recognizance Bonds in the amount of $5,000.00, filed for each defendant.
3/11	Judgments and Commitments, filed for each defendant.(Clarie,J.) m-3/11/75 Two attested copies handed US Marshal in Hartford and copy handed US Probation Officer in Hartford.
3/17	Notice of Appeal re Howard W. Bronstein, filed. Copies sent to counsel of record.
"	Notice of Appeal re Douglas Pennington, filed. Copies sent to counsel of record.
3/17	Certified copy of Notice of Appeals and Docket Entries sent to U.S.C.A.
3/21	Acknowledgement from USCA for documents mailed on 3/17/75, filed.
4/5	Record on Appeal sent to USCA. Copies of Index and Docket Entries sent to Attorneys Dorsey, Slitt and McEleney.
4/8	Copy of Schedule of Hearing from USCA, filed.
4/14	Court Reporter's Transcript of proceedings held on October 21 and 22, 1974 (1 vol.), filed in Hartford. (Sperber, R.)
4/11	~~Court Reporter's Transcript of proceedings held on Octo~~ upli-cate, see previous entry.
4/9	Acknowledgement from USCA for Record on appeal, filed.
4/30	Court Reporter's Notes of Proceedings held on January 9, 1975, filed in Hartford. (Sperber, R.)
5/1	Magistrate's Papers filed. (Parker, Mag.) Record of Proceedings in Criminal Cases and Complaint.
4/25	Supplement to Record on Appeal mailed to USCA. Copies of index mailed to Attys. Smith, Slitt and McEleney.
5/3	Acknowledgement for documents mailed on 4/25/75 received from USCA and filed.
5/12	Copy of Schedule of Hearing from USCA, filed.
5/19	Motion For Area Extension On Bond Pending Appeal, filed re Howard M. Bronstein.
5/19	Endorsement entered and filed on Motion For Area Extension On Bond Pending Appeal, "May 19th 1975. Motion granted as requested. So ordered."(Clarie,J.)m-5/20/75 Copies sent to Attys. McEleney and Smith.
5/22	Court Reporter's Sound Recording of Proceedings held on March 10, 1975, filed in Hartford. (Sperber, R.)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
V.	:	CRIMINAL NO. H74-118
HOWARD M. BRONSTEIN and DOUGLAS P. PENNINGTON	:	

I N D I C T M E N T

The Grand Jury charges:

ONE COUNT

On or about the 6th day of July, 1974, in the District of Connecticut, HOWARD M. BRONSTEIN and DOUGLAS P. PENNINGTON, the defendants herein, did knowingly and intentionally possess with intent to distribute approximately two hundred and forty (240) pounds of a Schedule I controlled substance, to wit, marihuana, in violation of Title 21, United States Code, Sections 812 and 841(a)(1).

A TRUE BILL.

Foreman

HAROLD J. PICKERSTEIN
United States Attorney

THOMAS P. SMITH
Assistant United States Attorney

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
V.	:	CRIMINAL NO. H-74-118
HOWARD M. BRONSTEIN and DOUGLAS P. PENNINGTON	:	

MOTION TO SUPPRESS

Pursuant to the Federal Rules of Criminal Procedure, the Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States the defendants move to suppress:

One blue suitcase allegedly containing 58 pounds of marihuana.

One maroon suitcase allegedly containing 63 pounds of marihuana.

One yellow suitcase allegedly containing 60 pounds of marihuana.

One yellow suitcase allegedly containing 59 pounds of marihuana.

The defendants respectfully request the Court to suppress the above enumerated items for the following reasons:

a. Said search and seizure was made without a warrant.

b. The agents did not secure the free and voluntary consent of the defendants to conduct said search and seizure.

c. The agents lacked probable cause to search and seize the above items or to arrest the defendants.

Dated at Hartford, Connecticut, this _____ day of September, 1974.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :

V. : CRIMINAL NO. H-74-118 SMO

HOWARD M. BRONSTEIN and :
DOUGLAS P. PENNINGTON

MOTION TO SUPPRESS

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c. The agents lacked probable cause to search and seize the above items or to arrest the defendants.

Dated at Hartford, Connecticut, this 13th day of September, 1974.

"After having reviewed the factual record and the applicable law, the Court denies the defendants' motion to suppress the 240 pounds of seized marihuana.. The Court adopts the Government's proposed findings of fact and conclusions of law as submitted. So ordered."

-USDJ 11/5/74

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
v.	:	CRIMINAL NO. H-74-118
HOWARD M. BRONSTEIN and DOUGLAS P. PENNINGTON	:	

GOVERNMENT'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO SUPPRESS

Defendants, Howard Bronstein and Douglas Pennington, were indicted by a federal Grand Jury for possessing with intent to distribute approximately 240 pounds of a Schedule I controlled substance in violation of Title 21, United States Code, Sections 812 and 841(a)(1). That substance, marihuana, was discovered during the course of a warrantless search conducted subsequent to the defendants' arrest at Bradley International Airport on July 6, 1974. Through counsel, defendants have moved to suppress that evidence, alleging that the federal agents who effected the arrest lacked probable cause either to arrest them or to search their belongings, and that the search in question was conducted without defendants' free and voluntary consent. As more fully set forth hereafter, the Government submits that defendants' motion to suppress should be denied.

I.

PROPOSED FINDINGS OF FACT

1. On July 6, 1974, Special Agent Wayne Drew of the Hartford office of the Drug Enforcement Administration (hereafter DEA), was contacted by Special Agent Edward McCrady of the San Diego, California office of DEA.

2. McCrady informed Drew that two American Airline ticket agents, whom McCrady had found to be reliable in the past, had provided him information about two individuals who had purchased tickets that morning on American Airlines flight number 10, bound

for Bradley International Airport in Windsor, Connecticut.

3. McCrady informed Drew that, when purchasing the tickets, the two individuals acted as though they were total strangers but, shortly thereafter, were seen conversing as though they were "old friends."

4. McCrady also informed Drew that at the time the tickets were purchased each individual checked in two, large, new suitcases.

5. McCrady further advised Drew that each of the four suitcases was equipped with combination locks, was approximately the same size, and was approximately the same weight.

6. McCrady indicated that one of the individuals used the name "B. Drake," and the other used the name "H. Braun" in purchasing the tickets.

7. McCrady, additionally, provided Drew with a description of the two individuals.

8. Upon receipt of this information, Drew contacted "Troop W" of the Connecticut State Police, a special police unit permanently stationed at Bradley International, to ascertain whether a police dog trained to detect the presence of marihuana would be present at time flight 10 arrived.

9. Drew was informed by Trooper Robert Ness that the police dog "Meisha," and its handler, Trooper John Foley, would be at the airport at 8:00 a.m.

10. Drew then contacted Special Agent Dale Seymour, also of the Hartford office of DEA, and both proceeded to Bradley International.

11. Upon their arrival at the airport, Agents Seymour and Drew met with members of Troop W to discuss the arrival of flight number 10.

12. Shortly before the plane arrived, AGent Seymour, Trooper Alden Ringklib, Trooper John Foley, and the police dog "Meisha," stationed themselves in the luggage unloading area.

13. After flight 10 landed, the luggage from the airplane was placed by airline personnel onto baggage carts and then onto a conveyor belt, which returns luggage to awaiting passengers.

14. Approximately 50 pieces of luggage were unloaded from flight number 10.

15. As these pieces of luggage were placed on the conveyor belt, Trooper Foley permitted his dog to walk alongside the belt and sniff all 50 pieces of baggage.

16. Of the approximately 50 pieces of luggage on that flight, the police dog reacted positively to two pieces: a new, large yellow suitcase with a combination lock; and a new, large blue suitcase, with a multi-colored stripe, and a combination lock. (Gvt. Exhibits 4 and 3, respectively.)

17. Seymour and Foley together witnessed "Meisha" pay particular attention to and actually bite both of these pieces of luggage.

18. "Meisha" is a German Shepard dog, which is owned by the Connecticut State Police Department, and which has been specially-trained to detect the presence of marihuana.

19. "Meisha" has been used by the Connecticut State Police during numerous investigations at Bradley International Airport.

20. In each and every instance in which "Meisha" has reacted positively to baggage, that baggage has later been found to contain marihuana.

21. "Meisha" has also been used in over thirty training exercises, and similarly has never reacted positively to a bag later found not to contain marihuana.

22. Although "Meisha" has been deceived in the sense that she has occasionally failed to detect marihuana, the dog has never been wrong about the contents of a piece of baggage to which it has reacted,

23. While Troopers Ringklib and Foley and Agent Seymour were in the luggage unloading area with "Meisha," Agent Drew and Troopers

Ness and Jacoby stationed themselves on the other side of a partition in the baggage claim area.

24. Trooper Ringklib and Agent Seymour advised Drew, Jacoby, and Ness that "Meisha" had reacted positively to the yellow suitcase (Gvt. Exhibit 4) and the blue-striped suitcase (Gvt. Exhibit 3).

25. While in the baggage claim area, Drew, Ness and Jacoby noticed two men whose physical descriptions coincided with those given to Drew by Agent McCrady.

26. Only two individuals met the descriptions which McCrady had supplied.

27. Agent Drew saw a man, later identified as Howard Bronstein walk to the conveyor belt, pick up the blue-striped suitcase (Gvt. Exhibit 3) and leave the area.

28. Drew also observed Bronstein pick up a large, maroon suitcase (Gvt. Exhibit 2) at that time.

29. Moments later, Drew and Seymour observed a man, later identified as Douglas Pennington pick up two large yellow suitcases (Gvt. Exhibits 1 and 4), one of which (Gvt. Exhibit 4) had previously been bitten by "Meisha."

30. Seymour and Drew then approached Pennington and inquired whether his name was "B. Drake" and whether the suitcases he was carrying belonged to him. Pennington replied in the affirmative.

31. Pennington was then placed under arrest by Agent Seymour, and was taken upstairs to the office of Troop W.

32. Troopers Jacoby, Foley, and Ness accompanied Seymour upstairs with Pennington.

33. In the meantime, Agent Drew and Trooper Ringklib pursued Bronstein, who was then standing in a rent-a-car packing area adjacent to the terminal building.

34. Drew asked Bronstein whether his name was "H. Braun" and whether he owned the bags which he was carrying. Bronstein replied in the affirmative.

35. Bronstein was then asked to accompany Drew and Ringklib to the Troop W office.

36. Once inside the Troop W office, both defendants were placed under arrest and were advised of their rights.

37. Both defendants stated they understood their rights but did not wish to give a statement until they had consulted with a lawyer.

38. Both defendants expressed a desire to leave as quickly as possible and asked the agents what procedure would have to be followed in order to secure their release as quickly as possible.

39. Drew and Seymour indicated that a search warrant for defendants' luggage would have to be obtained and that this would require the preparation of an affidavit in support of a warrant.

40. Drew and Seymour further explained that they would have to locate a United States Magistrate who could arraign them and set bond.

41. Drew and Seymour informed the defendants that if they wanted to permit the bags to be opened immediately they could do so, and that this procedure would save some time.

42. The defendants requested the opportunity to speak privately between themselves, and the Agents agreed.

43. The purpose of this conversation was to decide whether they would consent to an immediate search of their luggage.

44. Agents Drew and Seymour not only agreed to allow defendants to discuss, but imposed no time limitation on how long defendants could be alone.

45. Defendants were left alone together to confer for approximately fifteen minutes.

46. At the end of their discussion, defendants asked to speak to a federal agent.

47. Agents Drew and Seymour entered the room in which the defendants had talked.

48. Defendants stated they were willing to provide the combinations to their luggage on the condition that the Agents "guarantee" they not spend any time in jail.

49. The Agents stated that such a guarantee was impossible because: A) neither defendant had ties in the District of Connecticut B) neither had sufficient funds to post a significant bond; C) a substantial amount of marihuana was involved and D) they didn't know how long it would take to locate a Magistrate.

50. Defendants then asked if the Agents could "guarantee" a low bond or release without bond. The Agents again stated that such a "guarantee" was impossible for the previous reasons and because they had no authority to speak for the Magistrate.

51. Defendants then inquired if the Agents would be willing to recommend a low bond or release without bond in return for defendants' cooperation. The Agents agreed.

52. The defendants, and not the Agents, initiated the discussion concerning bond.

53. At no time did either Agent, or any law enforcement officer, state or imply that they would recommend a high bond in the event that defendants did not consent to an immediate search of their luggage.

54. Agents Seymour and Drew merely responded to the defendants' inquiries about bond.

55. At no time did any law enforcement officer, state or federal, state that defendants would be placed in jail in the event that consent was not given.

56. At no time did any law enforcement officer, state or federal, indicate that no attempt would be made to locate a Magistrat in the event that consent was not given.

57. Defendants initiated the discussion of bond because they realized that they were in trouble and hoped that by cooperating they could improve their own position.

58. At no time did any law enforcement officers, state or federal, use verbal abuse; have their guns drawn; employ physical force; attempt to hide their identities; attempt to deceive defendants; claim a right to open defendants' suitcases without a warrant; or state that a warrant was unnecessary.

59. Defendants freely and voluntarily consented to a search of their four suitcases and provided Agents Drew and Seymour with the combinations.

60. Defendant Bronstein told Seymour and Drew which combinations went with which suitcases and assisted Seymour in opening them.

61. These four suitcases were found to contain approximately 240 pounds of marihuana and mothballs.

62. Defendants were promptly arraigned before United States Magistrate Thomas F. Parker at his summer home at Niantic.

63. In accordance with defendants' request, Agents Drew and Seymour recommended that defendants be released on their own recognizance.

64. Magistrate Parker independently evaluated the facts before him and released defendants on a non-surety bond.

65. Defendants are presently free on a non-surety bond.

66. Defendant Bronstein is a 24-year old college graduate, who holds a B.A. degree from the University of Massachusetts, and who resides in Boston, Massachusetts.

67. Defendant Pennington is a 26-year old adult, who has attended Arizona State University for over three and one-half years, and who resides in Phoenix, Arizona.

68. At the suppression hearing both defendants testified incredibly as to their use of fictitious names in purchasing tickets on American Airlines flight number 10. The credibility of this testimony sheds light on the credibility of the remainder of defendants' testimony,

69. Although both defendants initially stated that they would give no statements until they first consulted with a lawyer, they

later requested to discuss between themselves whether they would permit their bags to be searched.

70. At no time did defendants tell any law enforcement officer, state or federal, that they were unwilling to talk with the Agents.

71. Before any conversation with defendants took place, they were fully advised of their right not to answer any questions. Defendants indicated that they understood these rights.

72. At no time did either defendant demand the right to consult with an attorney.

73. At no time did any law enforcement officer, state or federal, tell either defendant that he was required to answer any question.

74. No form of coercion, either express or implied, was employed to obtain defendants' consent to an immediate, warrantless search of their bags.

II

CONCLUSIONS OF LAW

The Government respectfully submits that there was ample probable cause for defendants' arrest at Bradley International Airport, and that the evidence which it intends to offer at trial was the product of a valid, warrantless search of defendants' luggage. The Government further submits that only one search occurred in the present case.

A. THERE WAS AMPLE PROBABLE CAUSE FOR DEFENDANTS' WARRANTLESS ARREST

Contrary to the impression created by defendants' memorandum of law, the Government does not contend that the information provided to Agent Drew by Agent McCrady in itself constituted probable cause for an arrest. The Government does maintain, however, that this information, coupled with the reaction of the police dog "Meisha" to two of the approximately 50 pieces of baggage on that flight, most clearly did supply probable cause for a warrantless arrest.

Probable cause, whether it be in the context of a search or an arrest, is a common sense concept. Whether it exists must be determined "on factual and practical considerations of everyday life . . . ," United States ex rel. DeNegris v. Menser, 247 F. Supp. 826, 830 (D. Conn. 1965), aff'd 360 F.2d 199 (2d Cir. 1966), and "[o]nly a probability of criminal activity . . . ," United States v. Gimelstob, 475 F.2d 157, 160 (3rd Cir. 1973), "and not a prima facie showing," United States v. Mulligan, 488 F.2d 732, 736 (9th Cir. 1973), need be made out before probable cause is established. It is, as the Supreme Court has stated:

> "the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observed as trained officers. We weigh not individual layers but the 'laminated' total. It has often been repeated, but bears repetition that 'in dealing with probable cause, * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicans, act.' Brinegar v. United States, supra, 338 U.S. at 175, 69 S.Ct. at 1310, 93 L.Ed. 1879. (Emphasis added)." Smith v. United States, 358 F.2d 833, 837 (D.C.Cir. 1966).

The information supplied by Agent McCrady merely constituted one layer of the information known to Seymour and Drew at the time of defendants' arrest. It is irrelevant that this information, taken by itself, may have been consistent with innocence:

> "But probable cause 'is a practical, nontechnical conception.' Brinegar v. United States, supra, 338 U.S. at 176, 69 S.Ct. at 1311 - no particular element must always be present; the presence of no one element is invariably conclusive. The presence or absence of probable cause is to be determined 'in the light * * * all the circumstances,' ibid. - it is immaterial that each circumstance, taken by itself, may be consistent with innocence. See United States v. Bianco, 189 F.2d 716, 720 (3d Cir. 1951)." Hernandez v. United States, (9 Cir. 1966) 353 F.2d 624, 628. [Emphasis added].

The penultimate layer of information was supplied by the police dog's reaction to the two suitcases (Gvt. Exhibits 3 and 4), as they passed along the conveyor belt. The final layer of information came into being when the defendants, the only two individuals who

matched the description given by McCrady, picked up the suitcases and, later, acknowledged their ownership. Considered together, these factors fully justified defendants' immediate, warrantless arrest.

It is irrelevant that the first layer of information possessed by Drew and Seymour constituted hearsay. This is so because hearsay on hearsay is sufficient to establish probable cause, see e.g., Maclean v. Trainor, 365 F. Supp. 695, 698 (W.D. Pa. 1973); United States v. Geldon, 357 F. Supp. 735, 737 (N.D. Ill. 1973); United States v. Markan, 356 F. Supp. 742, 745 (N.D. Ohio 1972). Cf. Stone v. United States, 390 U.S. 204 (1968); United States v. Ventresca, 380 U.S. 102 (1965).

Defendants' claim that the police dog's sniffing of the baggage from flight number 10 constituted a search is nonsense. Defendants' attempt to analogize the use of a police dog to detect the presence of marihuana to the use of a magnetometer is simiarly faulty. A magnetometer is a technological device used to detect the presence of metal which is not in plain view, and which is frequently concealed on a person. In the present case, a non-technological device was used to detect the presence of odors emanating from baggage in the hands of a public bailee. It was not necessary for "Meisha" to enter, or in any way penetrate, defendants' bags in order to detect the presence of marihuana. To the contrary, the pungent odor of that substance filtered out from two of defendants' four bags. "Meisha's" heightened olfactory perception detected that odor.

The sense of smell, like that of sound and sight, has often been held reliable in establishing probable cause. As the Supreme Court has observed:

> "A qualified officer's detection of the smell of mash has often been held a very strong factor in determining that probable cause exists . . . ." United States v. Ventresca, supra, 380 U. S. at 111.

The reason for this observation is manifest: odors and sounds which emanate from an object are analagous to items in plain view.

Defendants' claim that the very use of a police dog constituted a search has already been squarely rejected by the United States Court of Appeals in United States v. Fulero, 498 F.2d 748 (4th Cir. 1974). In that case, a police dog known as "Chief" was used to detect the presence of marihuana in a footlocker at a bus terminal. In a per curiam opinion the Court disposed of defendant's"search claim" in the following manner:

> "The appellant contends that Chief's sniffing of the air around the footlockers was an unconstitutional intrusion into the lockers. We think the argument is frivolous. The appellant also contends that there was no probable cause for the issuance of the search warrant. We think there was ample probable cause and that the conduct of the police was a model of intelligent and responsible procedure." Id. at 749. (Emphasis added).

United States v. Fulero, supra, is sound and should be followed by this Court. Also see United States v. Unrue, 14 Crim. L. Rptr. 2028-2030 (Sept. 21, 1973). Defendants' warrantless arrest should, therefore, be upheld.

B. DEFENDANTS FREELY AND VOLUNTARILY CONSENTED TO A WARRANTLESS SEARCH OF THEIR LUGGAGE

The Government does not, as defendants suggest (at 15-17 of their memorandum), contend that the suitcases in question were searched incident to their arrest. The Government instead maintains that Exhibits 1 through 4 were opened as a result of defendants' free, voluntary, and knowing consent to a warrantless search.

> "It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent. Davis v. United States, 328 U.S. 582, 593-594; Zap v. United States, 328 U.S. 624, 630." Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). (Emphasis added).

At the outset the Government respectfully submits that Agents Drew and Seymour had both probable cause to arrest, and probable cause to obtain a search warrant. It should further be noted, and found

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as a matter of fact, that the Agents specifically told defendants that they (the Agents) planned to obtain a search warrant. The only issue before the Court is whether defendants freely and voluntarily agreed to permit the opening of their bags without the necessity of requiring a search warrant, for which ample probable cause in fact existed.

Whether consent is free and voluntary "is a question of fact to be determined from the totality of all circumstances." Schneckloth v. Bustamonte, supra, 412 U.S. at 227. Although the Government has the burden of establishing consent by "clear and convincing evidence," United States v. Mapp, 476 F.2d 67, 77 (2d Cir. 1973), a finding of free and voluntary consent will not be lightly overturned. See e.g., United States v. Bracer, 342 F.2d 522, 524-525 (2d Cir.), cert. denied 382 U.S. 954 (1965); Drummond v. United States, 340 F.2d 983, 988 (8th Cir. 1965); United States v. DuShane, 435 F.2d 187, 192 (2d Cir. 1970); United States v. Callahan, 439 F.2d 852, 861 (2d Cir.), cert. denied 404 U.S. 826 (1971).

Despite the fact that the consent search in Bustamonte occurred prior to defendant's arrest, the Supreme Court has clearly indicated that a valid consent search may take place even after a defendant has been arrested:

> "[I]n those cases where there is probable cause to arrest or search, but where the police lack a warrant, consent search may still be valuable. If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. In short, a search pursuant to consent may result in considerably less inconvenience for the subject of the search, and, properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity." Id. at 228.

Also see, United States v. Heimforth, 498 F.2d 970, 971-972 (9th Cir.), cert. denied _____U.S._____, 94 S.Ct. 1615 (1974)(holding that the test of voluntariness of consent is the same irrespective of whether the search occurs prior or subsequent to an arrest);

in accord see, United States v. DeMarco, 488 F.2d 828, 830-831, n. 7, (2d Cir. 1973) (but noting implicitly that the Government's burden may be higher when "consent" is obtained subsequent to an arrest); United States v. Candella, 469 F.2d 173, 175 (2d Cir. 1972); United States ex rel. Lundergan v. McMann, 417 F.2d 519, 521 (2d Cir. 1969).

The Government respectfully submits that the totality of the evidence adduced at the suppression hearing in this case establishes that defendants' consent "was in fact voluntarily given, and [was] not the result of duress or coercion, express or implied." Bustamonte, supra, 412 U.S. at 248. At that hearing the Government established that the Agents explicitly indicated that they planned to obtain a search warrant in order to gain entry to defendants' luggage; that defendants themselves wanted to avoid the delay which preparation of an affidavit would entail; and that defendants themselves requested, and were permitted, to be alone to discuss whether they would permit their bags to be opened without a warrant. Cf. United States ex rel. Gockley v. Meyers, 378 F.2d 398 (3d Cir. 1967); United States v. Boukater, 409 F.2d 537, 538 (5th Cir. 1969), (expressly indicating that consent is not vitiated by a law enforcement officer's statement that he will attempt to procure a warrant). Also see, United States v. Fernandez, 456 F.2d 638, 640 (2d Cir. 1972).

At that hearing the Government further established that no law enforcement officer, state or federal, attempted to deceive defendants by either hiding their identity; falsely pretending already to have a search warrant; or claiming that a warrant was unnecessary. See United States v. Jones, 475 F.2d 723, 728-730 (5th Cir. 1973) (recognizing that the element of duress which is inherent in any arrest situation is insufficient by itself to vitiate consent, but prohibiting officers from asserting a 'claim of right' to search without a warrant); and United States v. Robson,

477 F.2d 13, 17-18 (9th Cir. 1973) (noting that deceit or misrepresentation invalidates consent). The Government also established that at no point did any law enforcement officer draw his firearm or resort to physical or verbal abuse. Cf. United States v. Mapp, 476 F.2d 67, 78 (2d Cir. 1973); Maxwell v. Stephens, 348 F.2d 325, 336 (8th Cir.), cert. denied 382 U.S. 944 (1965) (Blackmun, J.).

Similarly, the Government established that, far from being aged or debilitated, cf. United States v. Albarado, 495 F.2d 799, 801-802 (2d Cir. 1974), and therefore more easily susceptible to coercion, the defendants were both in their middle-twenties, well-educated, familiar with the English language, and appeared fully to understand their rights.

Only two claims made by defendants merit further discussion. The first is defendants' contention that Agents Drew and Seymour, in effect, used their power to recommend bond as a tool to coerce defendants into waiving their right to require the Agents to obtain a search warrant. The Government respectfully submits that the evidence adduced at the suppression hearing does not support this claim. To the contrary, the evidence indicates that it was the defendants who, after discussing the possibility of cooperation between themselves, asked the Agents if they would be willing to recommend a low bond, or release without bond, in exchange for defendants' consent. At no time did the Agents attempt to coerce consent by either expressly or implicitly threatening a high bond in the event consent were withheld.

As a practical matter it is clearly not unreasonable for a law enforcement officer to accede to such a request. The ultimate object of most drug investigations is to detect the source of the narcotics in question. By acquiescing to defendants' request, the Agents placed defendants in a position where defendants could, if they desired to cooperate, introduce undercover officers to the source of their supply. This could not be done if defendants were incarcerated. Moreover, the evidence indicates that the Agents

fully complied with the condition that defendants attached to their consent: they did, in fact, recommend that defendants be released on their own recognizance.

It, moreover, defies common sense to suggest that Agent Drew and Agent Seymour attempted to use bond as a tool to coerce consent. Drew and Seymour had ample probable cause to obtain a warrant and, since defendants had already been arrested and, therefore had to be arraigned anyway, thus stood little to gain by coercing anyone. They could have easily prepared the affidavit in support of the warrant, taken it with them to the Magistrate, and had it executed immediately prior to the arraignment. As a matter of fact, Agent Drew clearly testified that it made no real difference to him whether defendants consented or not, because he had to schedule an arraignment and appear before Magistrate Parker in either event. To the contrary, the evidence suggests that it was defendants who used their cooperation as a tool to exact from Seymour and Drew a promise for a personal recognizance bond recommendation.

Defendants' contention that they were denied their right to counsel is likewise without merit. Agents Drew and Seymour both testified that the defendants were immediately advised of their rights as soon as Bronstein was brought to the Troop W office. Defendants were explicitly told by the Agents that they had a right to remain silent; that they had a right to counsel; and that they did not have to answer any questions. In addition, defendants were advised of their other rights, as set forth on the standard advise of rights form carried by federal law enforcement agents. Defendants replied that they were unwilling to give any statements until they had first consulted with an attorney. The Government respectfully submits, and urges this Court to find as a matter of fact, that there is no credible evidence that defendants rights under Miranda v. Arizona, 384 U.S. 436 (1966) were ignored by any law

enforcement officer, state or federal.

The testimony adduced at the suppression hearing indicates that subsequent to being advised of their rights, defendants expressed concern as to how long they would be detained and questioned Agents Drew and Seymour as to what procedures would have to be followed. Agents Drew and Seymour simply responded to defendants' request for information by providing information. Miranda v. Arizona, supra, certainly cannot be read as prohibiting law enforcement officers from responding to the questions propounded by defendants, who have indicated an unwillingness to give statements without first consulting with an attorney. In short, Miranda prohibits continued interrogation after a defendant has indicated he wants to speak to an attorney. It does not prevent defendants from asking questions of police officers, nor does it prohibit law enforcement officials from responding.

It is further submitted that there is likewise no credible evidence that "defendants clearly, adamently and repeatedly demanded the right to consult with an attorney." (Defendants' memorandum at 18). To the contrary, the evidence merely indicates that defendants initially declined to make a statement until they had consulted with a lawyer. Shortly thereafter, in response to the information they elicited from Agents Drew and Seymour, defendants requested, and were permitted, to be alone to discuss whether they would save everyone the time necessary to get a warrant.

Defendant Bronstein testified, in effect, that the only reason he and Pennington cooperated was that they were "led" to believe that they had no choice, because the Agents did not acknowledge his and Pennington's "repeated requests for an attorney." The Government respectfully calls the Court's attention to the fact that this same witness testified that he used the name "H. Braun" because people had difficulty in pronouncing the name "Bronstein." An equally incredible explanation was offered by Pennington as to the

reason for his use of the name "B. Drake." The credibility of this testimony should be considered in evaluating the credibility of defendants' testimony in toto.

Apart from the incredibility of defendants' testimony, the law is clear that a defendant, who has been advised of his rights, cannot later undo an otherwise valid consent by claiming that he "thought his rights had been ignored." One Court of Appeals has spoken squarely on this issue:

> "Scheiblauer further contends that his own acts of opening his footlocker and throwing the marihuana on the floor were, in substance, a warrantless 'search' by the Customs agents. He alleges that, when the Customs agents responded to his request for an attorney by telling him he could contact one 'later' and by continuing to question him about personal data, he was led to believe that their earlier Miranda warnings were a mere formality and that they did not intend to honor his request. He reasons that, therefore, the marihuana and his subsequent incriminating statements were the 'fruit' of this alleged 'search.'
>
> The District Court rejected this contention when it denied Scheiblauer's motion to suppress and expressly found that he had voluntarily opened his luggage and exposed the marihuana . . . .
>
> The record contains sufficient evidence to support such a finding. Scheiblauer received two Miranda warnings and affirmatively stated that he understood them. Agent Paulsen reinforced Scheiblauer's awareness that he could properly refuse to open his luggage by telling him that, if necessary, a search warrant for the luggage would be obtained through the U. S. Attorney." United States v. Scheiblauer, 472 F.2d 297, 301 (9th Cir. 1973).

III

CONCLUSION

For the foregoing reasons the Government respectfully submits that it has sustained its burden of showing that defendants' warrantless arrest was valid, and that the subsequent search of defendants' suitcases was conducted with their free and voluntary

consent. The instant motion to suppress should, therefore, be denied.

Respectfully submitted,

UNITED STATES OF AMERICA

PETER C. DORSEY
United States Attorney

By: Thomas P. Smith
THOMAS P. SMITH
Assistant United States Attorney

CERTIFICATION

This is to certify that a copy of the foregoing Memorandum was mailed, postage prepaid, this 1st day of November, 1974 to counsel for the defendants, Aaron Slitt, Esquire, 242 Trumbull Street, Hartford, Connecticut 06103.

Thomas P. Smith
THOMAS P. SMITH
Assistant United States Attorney

MR. SMITH: Thank you

THE COURT: Any questions, Counselor?

MR. SLITT: Yes, your Honor, just very briefly.

CROSS-EXAMINATION BY MR. SLITT:

Q You say that you and Agent Seymour assisted the airline employees in unloading the baggage from the carts, and placed them on the ground?

A Yes, just took them out and placed them on the ground.

Q So the dog would have easier access?

A Line them up in one long line, right.

Q I see. And that was the purpose of doing that, so that the dog would be able to --

A Go to every bag.

Q And have access?

Now, after these people were brought into the Troop W Headquarters, did you hear any discussion about a lawyer, or any requests, or any reference made by either of these Defendants to obtaining the services of an attorney?

A No, sir, I did not.

Q You do not recall any such discussion?

A No.

Q Any such request?

A No, sir.

A Yes.

Q Did you ever tell these Defendants that if they didn't cooperate, you'd recommend a high bond?

A I don't believe we told them what we would recommend, specifically. We did tell them that if they cooperated, we would recommend a non-surety bond. If they did not cooperate, we would be less inclined to recommend a low bond.

MR. SMITH: I have nothing further.

RECROSS EXAMINATION BY MR. SLITT:

Q Did you tell them that the chances were about 95 percent, on the basis of your experience, that the Magistrate would follow your recommendation?

A I stated that approximately 95 percent of the time, or thereabouts, that the Magistrate would agree with our recommendation, or give less than our recommendation. But that we could not promise that he would do that.

Q You did indicate on the basis of your experience in the past with the Magistrate, that there was a 95 percent chance that the Magistrate would go along with your recommendation?

A That's correct.

MR. SLITT: That's all.

MR. SMITH: I have nothing further.

THE COURT: Did you explain to them that they